PROCEEDINGS OF THE CONFERENCE ON LEGAL AND SOCIAL PHILOSOPHY.

The second meeting of this conference was held at Chicago, Friday and Saturday, April 10–11, 1914. The sessions, Friday morning and afternoon, were held in coöperation with the Western Philosophical Association at the Law School of the University of Chicago. On Friday evening, a dinner was given to the members of the conference by the local delegates from Northwestern and Chicago Universities. The dinner was followed by an informal discussion on the advancement of philosophic jurisprudence.

The last session was held Saturday morning at the City Club of Chicago and was devoted especially to the discussion of the significance of the recent tendency to introduce commissions in the administration of justice.

The Executive Committee of the conference was enlarged to consist of the following: J. H. Tufts, chairman; Henry M. Bates, John Dewey, W. F. Dodd, Warner Fite, Ernst Freund, Alfred Lloyd, N. W. McChesney, Roscoe Pound, T. R. Powell, Frank Sharp, Albion W. Small, Frank Thilly, John H. Wigmore, and M. R. Cohen, secretary.

The expenses of the meeting amounting to $33.80 were met by voluntary contributions.

M. R. Cohen,
Secretary.

Summaries of the papers read are as follows:

In Defense of Natural Rights. Warner Fite.*

The older theory of natural rights meant non-interference, the appeal from external control to private judgment. At present the tendency is to say that the individual is a product or function of society, so that he has duties to it, while it has none to him. The truth is we are products of our conditions only so far as we do not know what is going on in us. All values are created by consciousness. If a watch knew itself, it would have value for

*Summaries thus marked were made by Professor G. A. Tawney.

itself, and would have claims against its owner. The obligation of others to respect my rights is relative to my consciousness of my rights—this because the power to realize an end lies in the consciousness of it. What we are internally is what we produce self-consciously; all our authority as individuals is relative to this, and this is the new doctrine of natural rights. It asserts the superior rights of the more intelligent, for might does, in this sense, make right. The fundamental moral problem is that of fair competition; the moral struggle is a struggle of personal rights against vested privilege.

In the discussion which followed this paper Professor Fite set up as the basis of enforced social coöperation the distributive principle of individual good—each according to his intelligent share, and not each according to his ability to take and keep. The theory of natural rights holds that, however far ahead we may look, we should remember to conserve our own enjoyment as individuals.[1]

JUS NATURALE REDIVIVUM. M. R. Cohen.

While in America those who still speak of natural rights are generally antiquated jurists who are ignorant of the progress of European thought in the nineteenth century, there is today among advanced European thinkers of diverse schools a noticeable revival of natural law theories. To appreciate this movement we must analyze the classical objections to the older natural law theories and show that these objections have not touched the essence of the matter. The main objections have been the historical, the psychological, the legal and the metaphysical.

The historical objection proceeds as if dogmas as to past history, *e. g.* concerning a supposed state of nature, are necessary parts of all doctrines of natural law. But the fact is that Grotius, Hobbes, Rousseau, etc., when speaking of the state of nature refer essentially to something in the present.

The psychological objection is brought against the conception of an individual existing outside of organized society and yet capable of making rational social contracts. But a careful study of the history of the doctrine of natural rights shows that contractualism is not a necessary part of it.

[1]For an account of the discussion following each paper see *Journal of Philosophy* XI. pp. 345–f.f

The legal objection is that since the law is the will of the sovereign, or a system of established rules, questions of natural rights do not concern the jurist but are matters of ethics. Against this it can be shown that judges in the ordinary course of their work always do and must rely on their sense of justice. This is especially true of the United States where the bills of rights in the state and federal constitutions consist essentially of vague moral maxim, such as due process, equal protection of laws, etc.

The fourth or metaphysical objection proceeds on the assumption that all things are relative, in the sense that it is futile to look for unchangeable laws. But while it is true that particular rights have no meaning apart from the social conditions under which they must be applied, the principles according to which they are to be decided are relatively permanent. The unity of human culture is empirically, as well as theoretically, well founded.

A theory of natural rights or legal justice is thus seen to be not only possible but even unavoidable. To escape the errors of the older theories we must be careful not to rely on supposed self-evident principles, such as equality before the law, the right to life, the right to the product of one's labor, etc. On examination, the principle of equality is seen to be very obscure and to lead to flagrant injustice when interpreted literally, as meaning *e. g.*, that all guilty of the same act shall receive the same punishment. The right to life and the right to the full product of one's labor cannot both be unqualifiedly true, since they conflict in the case of the hopeless invalid, etc. Thus it is seen that a theory of legal justice requires systematic criticism from the point of view of the principles used and criticism from the point of view of the wealth of factual situations to which these principles are to be applied. For this task neither philosophers nor lawyers alone are qualified. Only by systematic coöperation between the two can this be achieved.

THE NOMENCLATURE OF LEGAL PHILOSOPHY. John H. Wigmore.

Dean Wigmore spoke of the transformations which the law is undergoing and of the need for a philosophic analysis, such as is found in Green's "Principles of Political Obligation," to enable us to obtain an intelligent grasp of the business of the law as a whole.

As a help in enabling us to make the problems of the philosophy of law more definite, the following classification of the branches of legal science (nomology) was proposed:

- Nomology
  - I. Nomoscopy
    - a. Nomophysics
    - b. Nomostatics
    - c. Nomogenetics
  - II. Nomosophy
    - a. Nomocritics
    - b. Nomothetics
    - c. Nomopolitics
  - III. Nomodidactics
  - IV. Nomopractics
    - a. Nomopoetics
    - b. Nomodicastrics
    - c. Nomodrastics

I. Nomoscopy studies law as it is, and its branches are description, explanation, and history.

II. Nomosophy is the science of the law as it ought to be, logically, ethically and politically.

III. Nomodidactics deals with the law as a teachable doctrine.

IV. Nomopractics deals with the law as it must be brought into the actual conduct of men, and thus deals respectively with (a) law-making or legislation, (b) the application of law to actual cases, and (c) the enforcement of law in making it prevail over antagonistic forces.

THE MORAL CRITERION IN SOME RECENT DECISIONS OF THE UNITED STATES SUPREME COURT. Frank Chapman Sharp.

That the law is utilitarian and ought always to be interpreted and developed with this truth in mind is recognized by practically every present-day student of the subject. But this view of the matter is too vague to be of very much practical value. The pressing problem is how to proceed when interests conflict, and it is here that the most important differences of opinion among our judges arise. In matters which concern the claims of individual liberty, the privileges of property, and the demand for equality of treatment, a definite answer has been gradually worked out by the Supreme Court of the United States and has been for the most part consistently employed in its decisions. It is most succinctly formulated in Bacon *vs.* Walker (1907), in the declaration: "The power of the state . . . extends to so dealing with the conditions which exist in the state as to

bring out of them the greatest welfare of the people." The principle: Infringement upon the claims of individual liberty, property, or equality is justified when necessary for the attainment of a greater good, has been applied in a great variety of decisions so that its meaning is unmistakable. That this principle is morally a just one would be agreed by the overwhelming majority of the ethicists of our generation. This fact is significant. For in interpreting the vaguely worded guarantees of the Fifth and Fourteenth Amendments of the Federal Constitution, the Court has been compelled to build up the law through a process of judicial legislation. And judicial legislation, like all other forms, is under obligations to be guided by principles of justice. Most of the state courts have had to start from constitutional provisions essentially the same in content as the amendments in question, and to make use in a similar manner of the process of judicial legislation. If then the authority of the Federal Supreme Court and the consensus of ethicists are worth anything, it would seem that these state courts ought to bring their decisions more closely into conformity with the decisions of this court.

THE NATURE OF SOCIAL RULES. Albion W. Small.

Sociology holds that we have passed the boundary between an earlier and a later period in the evolution of rules, the periods of custom and reflection. The two great questions of sociology are, Of what sort have rules been, and of what sort are they to be in the future? Customary rules were the will of the stronger exercised over the weaker. But rules were tempered by consideration of difficulty in enforcing them. The balance of power between many conflicting interests determined the rules of this era of evolution. Today, a new force is at work, a conception of the human lot which is likely to work a Copernican revolution in social controls. The human lot is a concurrence of reciprocal interests, recognized as a categorical imperative of objectivity. Rules are formulations of the indicated function of each interest in the economy of the whole or human lot. A social interest consciousness that judges each interest in reference to the rest is in process of development.

An impartial spectator is an impossibility. The method is to take the judgments of experts and test them by appeal to fact,

that is to say, by appeal to the part that the interest concerned plays in promoting the whole social process, whatever the latter may turn out to be. "There are no rights, except rights of way, in performing social functions." The evolving ideal is that of a community of reciprocating functions.

THE FORMAL RELATION OF RULE AND DISCRETION. Albert Kocourek.*

Discretion is a permanent characteristic of the law and a lever of legal evolution. It may be said to add to, modify, and even substitute for the law. The courts are thought to apply the law, but specific and direct applications are rare. Even where they occur, controversy and difference of opinion are not eliminated. In the legal syllogism, the law gives only the major premise, while the minor has to be discovered in the great laboratory of litigation.

English and American law is inductive, while continental or Roman law is deductive. The English judge has poorer tools to work with, but greater skill, than the continental judge. Our system tends to a great variety of rules. Sociological jurisprudence would override all rules and abandon concepts. Relative, changing, and living realities, are the subject matter of juristic science. Its method is the method of purpose and teleology. It must consider, not only the quantity and quality, but also the modality of juristic facts.

THE EPISTEMOLOGIC BASIS OF GENERAL RULES. David F. Swenson.

This paper contended that there must be an objective and self-identical body of juristic relations. Plato's eternal and unchanging ideas are reasserted. Meanings remain even when they change, and they admit of comparison. Logic discriminates alternative meanings and banishes lack of clearnesss. Custom, association, and the natural history of meanings, cannot be substituted for clearness and distinctness. Individual psychology alone does not account for perfect meanings. When the contents of juristic knowledge appear they are objective and independent. But what are the actual conditions under which rules are to be applied? Can their application be said to describe

a syllogism? No. No fact of juristic significance comes so labeled as to make its subsumption a mechanical process. That involves creative imagination based on a knowledge of the code and an understanding of the facts of the case. Only the trivial elements of the process are controlled by the abstract laws of logic. The judge's social philosophy, ethics, and knowledge of human nature, enter into the process, as also do his human sympathies. Two reasons are offered for the statement that the application of law is an act of creative imagination. First, no *completely* elaborated code is possible. Any actual system of rules is full of gaps and inadequate adjustments. Secondly, it is never possible completely to express our intentions in rules of law. Hence, rules of interpretation are necessary, and just rules of interpretation do not make the law, any more than gravitation makes the stone break the window. The limitations of human reason make these rules of interpretation necessary. Deciding cases on their merits is a confession of difficulty in subsuming the case under the proper rule.

THE SUBSTITUTION OF RULE FOR DISCRETION IN PUBLIC LAW. Ernst Freund.

The recent legislative tendency to delegate quasi-legislative powers to administrative authorities is believed by many to be a shifting from judicial rule to administrative discretion. In reality it is a change from very general legislative requirements, judicially administered with considerable latitude of jury verdicts, to specific requirements which furnish a much more definite rule for the administration of justice. The change is therefore from discretion to rule and not vice versa.

The real significance of the new movement is that the specific requirements emanate from administrative authorities rather than from the legislature. The advantage commonly predicated for this transfer is its greater flexibility. This, however, may as easily be a disadvantage as a benefit. The real advantage of the new policy is that it permits the application to rule-making of processes which in course of time should substitute principle for mere discretion. If it will accomplish this it will remedy one of the principal defects of our public law.

Discretionary powers have not been and are not unknown in our administration. All discretion in administration, however,

is an anomaly and the modern tendency is to reduce it to a minimum. In the history of English government the objection to discretionary powers has been overcome to a certain extent by giving the entire administration a very strong judicial cast, a characteristic of English administration which broke down only in the nineteenth century. This clearly tended to limit discretion by the observance of precedent and therefore to reduce it to principle. Where the application of principle seemed impracticable, the policy of the English law appears to have been to vest powers in the organs of self-government, whether jury, justice of the peace, or locally elective officers, and, in like manner, that function of government which seemed to be incapable of being subordinated to law, the variable element of policy, was eventually entirely withdrawn from the Crown and invested in the people's representatives.

In America the development of administrative organization has, on the whole, been away from the strong judicial complexion which it had in England, and moreover the entire constitution of the state was placed on a self-governmental, non-professional basis. As in England all acts of government involving free and uncontrolled initiative were vested in legislative bodies and the discretion exercised in such functions is commonly termed "legislative discretion." In America, moreover, these legislative bodies achieved an independence from executive guidance which was never equalled in England, let alone in other European countries.

The history of discretionary powers in America has moved in a vicious circle: they were first placed upon an entirely self-governmental basis and the self-governmental character of the authority was then pretty sure to prevent the growth of anything like system or principle in the exercise of the discretionary power. Past experience has clearly demonstrated the incapacity of the formerly prevailing type of administrative organization to develop anything like rule or system in the exercise of powers, and the same has been true, in perhaps even a more marked degree, of legislative action.

It must of course be conceded that there is in the function of legislation a very much larger legitimate field for the exercise of free and variable discretion. But we have failed to recognize that even in legislation there is much that ought to be controlled by system and principle. True, we have had constitutional

limitations enforced by the courts, but these have insisted upon the minimum and not upon the practicable maximum of order and system in legislative action.

Clearly the greatest problem of American public law is how to assert against unrestrained legislative discretion the legitimate claims of principle. One way would be the according of a larger and perhaps a controlling influence to the initiative of the executive power. This has been the burden of the recommendations of President Taft's Commission for Economy and Efficiency in the important field of public finance. (It is not impossible that the progressive democratization of our institutions will shift the balance of legislative power from the legislature to the executive. Up to the present, however, the actual advance in that direction has been relatively slight.)

The delegation of legislative power to administrative commissions is, however, another step in the same direction. The type of administrative action contemplated for the exercise of these delegated powers is clearly different from the old type of American administration. The procedural safeguards are more conspicuous and there is every reason to expect that the exercise of these powers will tend more and more to be quasi-judicial. The forms of judicial action will inject into the subordinate legislation produced by commissions the elements of principle in so far as it is amenable to principle, and the great value of the new development will be to help to determine the legitimate provinces of rule and discretion in our public law.

DISCUSSION OF THE ABOVE PAPER. W. F. Dodd.

The discretion conferred upon administrative bodies is of two types: (1) a discretion to make rules, and (2) a discretion to act in individual cases. The first is distinctly a legislative discretion, the second a judicial discretion. As to the first type, the issue is that as to whether the administrative body is more competent to make the rule than is the legislature. Legislatures to an increasing extent enact laws general in form and leave to administrative bodies the making of rules to carry out the legislative policy in detail. This policy has very definitely been adopted with respect to health regulation, railroad rates, and (more recently) the regulation of conditions under which laborers shall work.

Both the legislative and administrative body are making rules, but the rule of the administrative body is made upon expert knowledge, after investigation, and ordinarily after a hearing. As to matters requiring detailed and expert knowledge, the commission's rule is therefore apt to be much more satisfactory than is the legislative rule made ordinarily without careful investigation and without a hearing of the parties.

(2) The second type of administrative discretion is judicial or quasi-judicial—*e. g.*, the power to act in individual cases in revoking licenses, excluding or deporting aliens, or determining the compensation to be allowed to a workman in a particular case. (In the exercise of such powers, there comes a square issue between administrative justice and judicial justice, at least in those cases where the administrative determination is not subject to judicial review.) Administrative determinations in such cases are not merely arbitrary but are controlled by rules, and may be more just than judicial determinations would be, because based upon better technical knowledge. A mere arbitrary discretion of a subordinate administrative official should not exist, but properly safeguarded administrative tribunals are perhaps as apt to render justice as are judicial tribunals. Such administrative tribunals will naturally develop precedents and act in many respects as do judicial tribunals. It is for this reason that a review of decisions of an inferior administrative body or officer by a superior administrative tribunal may often prove as satisfactory as a judicial review.

The real danger of abuse of administrative discretion in individual cases comes (1) where the power of final determination is left to the uncontrolled discretion of an administrative officer who must act promptly as in granting or refusing a license to parade the streets, and (2) where a decision by an administrative officer is subject to what is perhaps a perfunctory review by higher officials, on appeal, as seems to be the case under the Chinese exclusion laws, and is conclusive as to matters of fact.

Discussion of the Paper Read by Mr. Crownhart on the Industrial Commission of Wisconsin. A. B. Hall.

The Industrial Commission of the State of Wisconsin was called into existence by certain definite needs which the old judicial and legislative machinery of the state was incompetent to

meet. The commission enjoys two powers, a quasi-legislative and a quasi-judicial power. It can decide controversies under the Workmen's Compensation Act and it can also enact new rules and orders for the better enforcement and execution of the principles of that act. In performing both of these functions it has the authority to send out, on its own initiative, experts to examine all the evidence in the case, to study up on the available material and to hold consultation with all those interested or affected by their adjudications or rules. Their jurisdiction is limited to a narrow class of cases and they are given a full corps of experts to conduct special investigations for them, whenever they may deem it necessary.

Compare the facilities of the Industrial Commission with those of our Judicial System for solving the same problems. Our courts are clothed with two forms of discretion, judicial and legislative. Judicial discretion is the discretion involved in applying the rules of law to definite statements of facts; their legislative discretion consists in their authority to lay down new principles of law where cases come before them for adjudication, requiring judicial action, but for which there are no principles of established law applicable.

It must be remembered that the courts are called upon to pass upon every conceivable kind of question, and to pass upon them rapidly, for they are generally behind in their calendars and overworked, and that in passing upon the most technical of questions, they must rely upon the legal evidence voluntarily presented by the litigants and have no authority or right to make a special investigation of their own, nor have they a corps of experts whom they can authorize to make such an investigation for them. In addition to this, they are further handicapped by the realization that any new principles they lay down are retroactive in character and that, having once been laid down, they cannot be changed except by the formal action of the legislature. Viewed from this standpoint, the wonder is that our courts have been as efficient as they have been. The movement represented by the organization of the Industrial Commission, is not a movement away from the principles of law to abstract conceptions of justice, but is a movement to change the judicial and legislative machinery of the state to meet certain technical and complex problems requiring the use of skilled experts and minute divisions of labor impossible under the old system.

An examination of the proceedings of the commissions established, evidences the fact that, in so far as they exercise judicial discretion, they exercise it according to established principle and not according to the whim and caprice of the adjudicators. While not bound by the rule of *stare decisis*, they consider themselves bound to harmonize their decision until they see fit to formally adopt a new policy in the exercise of their legislative powers. It is simply a process of specializing the law-making and law-applying functions, within certain limits of judicial control, to a definite and technical class of problems requiring for their just solution the aid and investigation of trained experts. The success of the commission is due to these factors; it is not due to the superiority of the commissioners over the judges, either as to viewpoint, training, sympathies or intellect. The commissions are asked to solve problems after careful and elaborate investigations, and, aided by such experts as they may desire, which the courts were asked to solve in rapid succession with no time or opportunity for specialization, and without the aid of expert advice and investigation. As was to be expected technical methods, expert service, and a division of labor have proven superior in the solution of technical problems, to the old judicial methods, with no technique save that of law, no specialization for special kinds of cases, no division of labor, no expert nvestigators, and no adequate time for the performance of their duties.